Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1174

DAVID BELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Petitioner, DAVID BELL, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the above case December 16, 1977.

OPINION BELOW

The opinion of the Court of Appeals of December 1977 is set forth in Appendix "A".

JURISDICTION

On December 16, 1977, The Court of Appeals for the Second Circuit entered Judgment affirming the criminal conviction of Petitioner for Conspiracy to Distribute Cocaine, in violation of 21 U.S.C., Section 846, and two (2) Counts of Distribution of Cocaine, in violation of 21 U.S.C. Sections 812, 841 (a) (1) and 841 (b) (1) (A).

On January 16, 1978, it was ordered that the time for Filing a Petition for Writ of Certiorari be extended to February 14, 1978. This Petition was filed within the specified time period. The Jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1) and Rule 22 (2), Rules of the Supreme Court.

QUESTIONS PRESENTED

I

WHETHER THE TRIAL COURT CONSTITUTIONALLY ERRED BY PERMITTING THE PROSECUTION TO INTRODUCE THE LENGTH OF THE SENTENCE BEING SERVED BY THE DEFENSE WITNESS TO IMPEACH HIS CREDIBILITY WHEN RULE 609 (A) OF THE FEDERAL RULES OF EVIDENCE DOES NOT PERMIT SUCH PROOF, WHEN THE EVIDENCE WAS NOT RELEVANT TO CREDIBILITY, AND WHEN THE PREJUDICE TO THE PETITIONER OUTWEIGHED THE PROBATIVE VALUE.

II

WHETHER THE PETITIONER WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY IMPROPER CROSS-EXAMINATION OF THE SOLE DEFENSE WITNESS AND A HIGHLY SUGGESTIVE CLOSING ARGUMENT THAT ENHANCED THE CREDIBILITY OF THE PROSECUTION WITNESSES AT THE EXPENSE OF THE DEFENSE, DEPRIVED THE PETITIONER OF THE ABILITY TO PRESENT A DEFENSE, AND INFRINGED UPON THE JURY'S CREDIBILITY DETERMINING PROCESS.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in part, that:

> No person shall . . . be deprived of life, liberty or property, without due process of law;

STATEMENT OF THE CASE

On or about April 11, 1977, DAVID BELL was tried for conspiring to Distribute Cocaine and two (2) Counts of Distributing Cocaine on October 3, 1974 and October 9, 1974. Prior to trial the Petitioner's brother, LESTER BELL, had pled guilty to the Conspiracy Count in the same indictment. LESTER BELL was sentenced to a term of five years, which was to run concurrently with a State Sentence he was then serving of fifteen years to life.

At trial a Police Undercover Agent, CHRIS JACKSON, testified that he asked BILLY VERNON for Cocaine on October 3, 1974. JACKSON said that he and VERNON went to an apartment where DAVID BELL and LESTER BELL later appeared and that the Petitioner sold him two ounces of Cocaine. Afterwards the Agent said that he found the weight to be short. In response to a complaint DAVID BELL allegedly remedied this on October 9, 1974 by producing a small amount of Cocaine without charge (T.19-36).

The agent was the only witness directly linking DAVID BELL to either the negotiations or the distributions. The remaining government witnesses were a Chemist and Agents who placed BILLY VERNON, LESTER BELL and DAVID BELL in areas described and at the times mentioned by JACKSON.

The only Defense Witness was LESTER BELL, who testified on Direct Examination that: he and not his brother initially discussed the sale with BILLY VERNON; transferred the drugs to and accepted the money from OFFICER JACKSON on October 3, 1974; heard the complaints about a shortage; and transferred the drugs to JACKSON on October 9, 1974. LESTER BELL denied that DAVID BELL was involved in either the negotiations or the transfers (T.95-101). Prior to his having taken the stand the Court had ruled, over Defense objections, that the government could bring out for purposes of impeachment LESTER BELL'S prior convictions as well as the length of the sentences imposed (T.67-69,90). Because of this Ruling Defense Counsel brought out on direct-examination the fact that LESTER BELL had pled guilty to the conspiracy charged in this case as well as the fact that he was serving a sentence of fifteen years to life on a State Conviction for Kidnapping (T.96-97).

The cross-examination of LESTER BELL dwelled primarily on the length of the State Sentence he was serving and the fact that he had received a concurrent five (5) year sentence as a result of his guilty plea in the instant case. Over Defense objections and without any justification for doing so, the Prosecutor warned the witness about the crime of Perjury, informed the Jury of the penalty for Perjury and then began a line of rhetorical questioning to the effect that the witness was testifying untruthfully because he was serving a sentence greater than that which could be imposed for the crime of Perjury (T.102-106).

The argument to the Jury by each attorney focused on the credibility of the witnesses. During this time the prosecutor again argued that LESTER BELL was a

perjurer because he was already serving a long sentence and had no reason to tell the truth since he did not have to fear a Perjury conviction (T.120).

On April 13, 1977, DAVID BELL was convicted by Jury on all three (3) counts.

On July 12, 1977 the Petitioner was sentenced to five (5) years imprisonment, to be followed by ten (10) years special parole, on each of the three (3) Counts, the sentences to run concurrently, and to a fine of $10,000 on Count I alone.

REASONS FOR GRANTING THE WRIT

1. IT WAS REVERSIBLE ERROR TO ALLOW THE PROSECUTION TO INTRODUCE THE LENGTH OF THE SENTENCES BEING SERVED BY LESTER BELL TO IMPEACH HIS CREDIBILITY WHEN FEDERAL RULE OF EVIDENCE 609 (A) DOES NOT PERMIT IT AND WHEN THE RESULT OF SUCH IRRELEVANT EVIDENCE WAS TO SIGNIFICANTLY IMPAIR THE DEFENSE.

Before LESTER BELL took the stand the government requested the court to allow it to bring out for impeachment purposes his prior convictions as well as the length of the sentences imposed. The Petitioner did not, and does not now, object to the admissibility of the convictions, but contends that it was error for the trial court to permit the introduction of the fifteen years to life state sentence as well as the concurrent five (5) year sentence being served by the witness.

As a result of the ruling holding such evidence admissible Defense Counsel attempted to minimize the

damage by bringing out on direct-examination the length of the sentences being served by LESTER BELL as well as the fact of the convictions. On cross-examination the prosecutor dwelled primarily on the length of the sentences, warned the witness about Perjury, informed the Jury of the penalty for the crime, and then implied on cross-examination and asserted during argument that the witness was being untruthful because he was serving more time than could be imposed for a Perjury conviction.

Rule 609(A) of the Federal Rules of Evidence provides that for purposes of attacking credibility, as the government intended here, evidence that a witness had been convicted of a crime shall be admitted under certain circumstances. On its face the rule does not permit the introduction of the length of sentences and proof of a sentence clearly is not evidence of a conviction for a crime.

There appears to be no Federal case specifically allowing the admission of such evidence under the circumstances present here. However, it has long been recognized that it is improper for the prosecution to go into the details of a crime when seeking to impeach a witness with prior criminal convictions whether or not that witness happens to be the Defendant. The prosecutor must limit questions concerning prior crimes to the number of convictions, the nature of the crimes and the time and date of each, and may not elicit additional information about the conviction to prejudice the Defendant. *United States v. Mitchell*, 427 F2d 644, 647 (3rd Cir 1970); *United States v. Bray*, 445 F2d 178, 182 (5th Cir 1971). See also, *United States v. Tumblin*, 551 F2d 1001 (5th Cir 1977), where the Court of Appeals held that cross-examination of the Defendant as to the length

of his confinement and the interims of freedom between the period of confinement, as well as closing argument along those lines, was prejudicial to the Defendant's right to a fair trial for the reason that improper inferences were raised before the Jury.

While the subject of the cross-examination was LESTER BELL rather than DAVID BELL, that in itself should have no significance where, as here, the scope of the impeachment was excessive and improper inferences were raised before the Jury concerning that witness. Where the Defense presented only one witness, LESTER BELL, the improper manner in which the Prosecutor attacked that witness was just as harmful to the Defense as if it had been DAVID BELL who had taken the stand. The only real issue before the Jury was whether to believe the testimony of LESTER BELL that he committed the crimes in question or that of OFFICER JACKSON that DAVID BELL was the culprit. Although LESTER BELL had made no prior inconsistent statements and there was no direct evidence that he actually was testifying falsely, the prosecutor weighed this crucial credibility issue in favor of the government by the prejudicial assertion that the witness was necessarily lying because the fifteen years to life sentence he was serving gave him no reason to fear a five year sentence for perjury. While advancing her position the prosecutor avoided mentioning the fact that a Federal Perjury conviction could be imposed so that it would begin to run only after the state sentence was completed. Other than the erroneous and prejudicial statements of the Prosecutor there was no more proof that LESTER BELL was a Perjurer than there was that OFFICER JACKSON was testifying falsely.

The length of the sentences being served by LESTER BELL were not admissible under Fed. R. of Evid. 609 and considering the manner in which it was utilized by the prosecution its admission was improper under Fed. Rs. of Evid. 401, 402, and 403 for the reasons that any probative value was greatly outweighed by unfair prejudice to DAVID BELL. The prejudice of which Rule 403 speaks is in terms of impermissible inferences which may result, and under this standard the trial court abused its discretion. It is the fact of prior convictions and not the length of the sentence imposed that is supposed to affect credibility. Where the conviction has been introduced there is no need to present evidence concerning the sentence, especially where, as here, improper inferences are created. Because of the trial court's ruling the Defense was forced to introduce evidence that LESTER BELL was serving a fifteen year to life sentence and a concurrent five (5) year sentence, facts which should never have been brought to the attention of the Jury. From these facts the government contended that the witness was a perjurer because he could only receive a five (5) year concurrent sentence for perjury.

This is exactly the type of prejudice to which Rule 403 speaks. When the Jury is faced with a credibility issue such as that here and the government is allowed to use erroneously admitted evidence to raise improper inferences to the effect that the one defense witness is a perjurer, it cannot reasonably be contended that the Defendant for whom that witness was appearing was not prejudiced by the damage done to his Defense.

2. THE PETITIONER WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY IMPROPER CROSS-EXAMINATION AND ARGUMENT.

The only issue in this case was the credibility of the witnesses for the opposing sides. OFFICER JACKSON testified for the prosecution and LESTER BELL appeared for the Defense. The testimony of these two (2) witnesses was inconsistent and could not be reconciled.

On cross-examination, over the objection of the Defendant, the Prosecutor inquired into the length of the sentences being served by LESTER BELL. Without any justification, and again over objection, the Prosecutor initiated unwarranted warnings about the crime of perjury, and through rhetorical questions implied if not argued that the witness was predisposed to commit perjury because he was serving a fifteen (15) year to life term while the penalty for perjury was only five (5) years.

> Q. You are aware that if you tell a false statement you are under —
>
> Mr. Bell: Objection, your Honor. There is no call for that.
>
> The Court. I will permit it. Overruled.
>
> Q. You are aware that if you tell a false statement when you are under oath on the stand in this court, you commit a crime called perjury, is that correct, if you do that behavior?
>
> A. If I don't tell the truth I commit a crime such as perjury.
>
> Q. And you are aware there is a penalty for perjury is that correct?
>
> A. I realize this.

> Q. You realize that the penalty is 5 years?
>
> A. I realize that.
>
> Q. So you realize that you are serving more time already than you could get if you are convicted for perjury? (T.104)

In her argument to the Jury, the Prosecutor again insisted that the sole defense witness was a perjurer because he had no reason to fear a perjury conviction.

> What do we hear from the other side? We hear the unimpeachable testimony of Lester Bell. What do you know about that testimony of Lester Bell? You know that he is a man who is serving 15 to life in the state courts. You know he is the brother of the defendant on trial. You know that when he got convicted of the federal offenses and was sentenced after the state court, he didn't get any additional time. And most of all, you know that even after he said he knew about perjury, he knows he is not supposed to lie under oath, he tells you that he picked the cocaine up off the sidewalk.
>
> Now, use your common sense. You know a little bit about the world. You know a lot about the world. Do you believe that testimony? And if you don't believe that testimony, do you believe anything that Lester Bell told you? Hasn't he every incentive in the world to take the weight, to protect his brother? What does he have to lose? He is already serving 15 to life in the state. (T.120)

A prosecutor has a heavy responsibility to conduct criminal trials with an acute sense of fairness and justice. *United States v. Corona*, 551 F2d 1386, (5th Cir 1977), and that duty was breached here. By insisting that

LESTER BELL was perjuring himseif when there was no direct evidence even suggesting that, the Prosecutor corroborated the prosecution witnesses while minimizing the testimony of the one defense witness. No witnesses, other than the defense witness, were warned about perjury, there was no reason why LESTER BELL could not have been instructed on the consequences of perjury outside the presence of the Jury, and although the Prosecutor must have known that a sentence for perjury could be imposed so that it would begin running after the state sentence ended, negating the argument that LESTER BELL had no reason to fear any additional punishment, she insisted otherwise.

As Judge Weinfield stated in *United States v. Winter*, 348 F2d 204, 210 (2nd Cir 1965):

> Once a witness swears to give truthful answers, there is no requirement to "warn him not to commit perjury or, conversely, to direct him to tell the truth." It would render the sanctity of the oath quite meaningless to require admonition to adhere to it.

That such warnings on the part of a Judge or a prosecutor may require reversal is shown by *United States v. Smith*, 478 F2d 976 (D.C. Cir 1973) and *Webb v. Texas*, 409 U.S. 95 (1972), and the same should also be true here where the Prosecutor impaired the defense by giving perjury warnings to a witness simply to expose the Jury to her belief that the witness was lying. It is reversible error for Prosecutors to place their own credibility in the balance against a Defense witness. *United States v. Puco*, 426 F2d 761 (2nd Cir 1971).

In *United States v. Bates*, 468 F2d 1252 (5th Cir 1972), the Defendant was charged with stealing a Treasury check and causing it to be forged and cashed. Prior to

trial, Harold Jackson had stated that he had forged and cashed the check at the direction of Bates. At trial, Jackson denied doing so and said that his prior statement was a lie. Jackson later returned to the stand, adopted his statement and admitted that his earlier testimony had been false. In the presence of the Jury, the Court directed that perjury charges be filed against Jackson. The conviction was reversed on the ground that the statements made by the Court prejudiced the Jury in favor of crediting Jackson's later testimony which implicated Bates more than the earlier testimony. The Jury's credibility determining process was said to have been infringed upon, thereby depriving Bates of a fair trial. *Bates, supra*, at 1255.

In the instant case, the Prosecutor singled out the one defense witness for an admonition on the dangers of perjury without any grounds for doing so other than the fact that the testimony given by that witness varied from the testimony given by the prosecution witness. On cross-examination, the Prosecutor did not merely reiterate the necessity to tell the truth and the combination of the cross-examination and her argument to the Jury was the assertion that LESTER BELL was certainly testifying falsely because he was serving a sentence that exceeded the penalty for perjury. Although it was for the Jury alone to determine whether LESTER BELL would be believed, the Prosecutor denigrated the defense witness without any factual support and thus vouched for the credibility of the prosecution witnesses. Where LESTER BELL was the only defense witness and the sole issue was the credibility of the witnesses, the rhetorical questions, comments and statements of the Prosecutor during cross-examination and argument were intended to influence and infringe upon the Jury's

credibility determining process. *United States v. Bates*, *supra*, and as a result impaired the Petitioner's ability to present his version of the facts to the Jury free from the improper influence or interference of the Prosecutor. *United States v. Smith*, *supra; Webb v. Texas*, *supra*. The conduct of the Prosecutor constituted plain error within the meaning of Federal Rules of Criminal Procedure, Rule 52, and, accordingly, denied DAVID BELL Appellant a fair trial and due process of law. The Prosecutor overstepped the bounds of propriety and fairness and it cannot be said that these errors were harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

CONCLUSION

It was error to admit evidence of the sentences being served by the one Defense witness for the reason that it was inadmissible under Fed. R. Evid. 609, it was irrelevant, and under Fed. R. Evid. 403 the resulting prejudice to Petitioner was greater than any probative value. Where the prosecution goes beyond the essential fact of the conviction to impeach a witness, reversal may be proper. *United States v. Mitchell*, *supra; United States v. Tomaiolo*, 249 F2d 683 (2nd Cir 1957). LESTER BELL was the sole defense witness and to permit the Government to bring in irrelevant and prejudicial factors to impeach his credibility which in turn allowed the Prouecutor to assert that he was a Perjurer when such a contention was not supported by the record deprived the Petitioner of the ability to put on a Defense, imposed upon the Jury's credibility determining process, and denied DAVID BELL a fair trial.

For the foregoing reasons, Petitioner, DAVID BELL, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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DATED: JANUARY 30, 1978

APPENDIX "A"

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and seventy-seven.

Present:

HON. J. EDWARD LUMBARD

HON. PAUL R. HAYS

HON. WILLIAM H. MULLIGAN

77-1325

Circuit Judges,

United States of America,

Plaintiff-Appellee

v.

Donald Payden, a/k/a Country, Billy Vernon, David Bell, Lester Bell, Jane Doe, a/k/a Jackie Smith,

Defendants

David Bell,

Defendant-Appellant.

77-1325

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

By

Deputy Clerk